COMPARATIVE STUDY OF THE STATE CONSTITUTIONS OF THE AMERICAN REVOLUTION.

As an historical introduction to this study of the state constitutions of the American Revolution it is quite important to sketch briefly the steps taken in definitely organizing the movement. These steps constituted a very critical transitional period extending over about two years just preceding the formation of the state constitutions. In order rightly to understand this transitional period it is well to note at the outset that the Americans came very far short of spontaneous unanimity in undertaking the Revolution. In most of the colonies the majority in favor of the movement was at first quite small, and there is good reason to believe that in some only a minority favored it.* In all the colonies the most persistent and vigorous agitation was necessary, the extent of which is not now easily realized. From first to last the success of the movement was due primarily to the skillful tactics and efficient zeal of more or less self-interested leaders. The American Revolution was a movement gradually conceived by a few capable, interested, yet for the most part lofty-minded, leaders, and by them carried to completion, assisted by an extremely sensitive average population

*This question is difficult to determine with exactness, inasmuch as there was no census and no popular vote of the right kind; but it seems quite certain that the Whigs were in a minority in Georgia, South Carolina and New York. The Tories were also numerous in Pennsylvania, Connecticut, Vermont, North Carolina, New Jersey, Delaware and Maryland. Pennsylvania and North Carolina were about evenly divided. The Tories always maintained that a fair vote would have prevented the Revolution, and considered this movement the work of a powerful machine shrewdly organized in each colony, county and town. Lecky goes so far as to say that it "was the work of an energetic minority who succeeded in committing an undecided and fluctuating majority to courses for which they had little love, and leading them step by step to a position from which it was impossible to recede."—("History of England in the Eighteenth Century." New Ed., Vol. iv, p. 224.) This language undoubtedly stretches the truth, but such high authorities as John Adams and Chief Justice McKean of Pennsylvania declared that one-third of all the people of the thirteen states opposed the Revolution in all its stages.—("Works of John Adams," Vol. x, pp. 63, 87, 110.)

in some sections, by exasperating episodes and keen brotherly sympathy in all the colonies.

Early in 1774, five very important measures were rapidly hurried through the British Parliament, the manifest object of which was to coerce the American colonies. I refer to the Boston Port Bill, the Transportation Bill, the Massachusetts Act, the Quartering Act, and the Quebec Act. These measures aroused far deeper indignation than had before existed in America. During the previous nine years, under the whip of the more radical leaders, the colonists had already indulged in much illegal and even violent conduct; but the passage of these "coercive acts" of 1774 and their attempted enforcement was the signal for further and more irregular proceedings in every American colony. By an almost unconscious process these irregularities led to the overthrow of the existing colonial governments. This strategic point having been gained the step to independence was a most natural one.

The mode of procedure in the dissolution of royal authority was much the same in all the colonies. The first definite step each colony took was to appoint delegates to a Continental Congress, a body altogether unknown in law to the existing colonial system. These delegates were appointed either by the colonial assemblies, with or without the governors' approval, or in a still more irregular manner, by self-constituted conventions or congresses. Simultaneous with this movement toward united counsel and action was the rapid growth of local committees of correspondence and safety.* These local committees speedily took unto themselves many important functions which had regularly devolved upon the tribunals and officers of the royal governments. Then, when the first Continental Congress agreed upon the so-called "Association," a great impulse was given to the further growth of these irregular com-

* Local committees of correspondence in many cases antedated the appointment of delegates to the Continental Congress.

mittees, for the regular governmental agencies were not generally good media for the enforcement of such a revolutionary measure. As it became more and more evident that English aggressions would be persisted in, and that force would be necessary to bring about a satisfactory adjustment of the difficulties, such committees became more and more necessary, and assumed more extended functions. At first in many cases they were self-appointed; but it was not long before the practice of regular elections by the qualified voters was developed. Thus these irregular bodies came to have, to a large extent, the force of public opinion back of them; but it should be remembered that minorities frequently prevailed, and in many places the votes were suspiciously small compared with the polling-lists.

Central direction soon became necessary for curbing the violence of these local bodies, as well as for making their action more effective and comprehensive. Hence in nearly all of the colonies irregular provincial conventions or congresses were summoned into being. As these bodies could not well sit continuously, it became necessary to entrust their authority during recess to central committees of safety, generally appointed by and from their own number. Naturally enough, under the circumstances, the functions of the regular colonial assemblies and governors were one by one, sometimes *en bloc*, assumed by these irregular conventions and committees. No real sanction was given to the mandates of these irregular bodies. In fact, their resolutions always went forth to the people in the form of recommendations; but, under the stress of constant agitation, their decisions came to have the force of law. Gradually these local and central committees of safety and the provincial conventions became systematized and their respective functions, composition and mode of election defined in varying degrees of perfection in the different colonies, amounting in some cases to quite elaborate provisional governments. Under the heat of such revolutionary movements, during

the years 1774–76, the royal governments in the various colonies completely melted away; and thus the people of each colony, almost before they realized it, found themselves face to face, not only with a great war, but with the equally important and difficult problem of regulating their internal affairs upon the basis of permanent written state constitutions. It is to a brief comparative study of the instruments resulting directly from this movement that the attention of the reader is invited in the following pages.

One further comment before proceeding to the discussion in hand. It is worth while to note that, on the whole, the transition from royal authority in the different American colonies to independent state governments was made in a careful and conservative manner. Violence and intimidation there was, enough and to spare, in some colonies;* but this is to be expected at such times, for "revolutions are not made with rose-water." In some sections Utopian and fantastic ideas of government were advanced that did not altogether fail of influence, and were faintly reflected in some of the first state constitutions. Yet, on the whole, good political sense and judgment and a most admirable self-restraint were displayed in the midst of most vexatious and dangerous circumstances. It should always be borne in mind that the years 1774–76 in America afforded a splendid opportunity for the reign of demagogism and the precipitation of anarchy upon the country. To be sure there were no long pent-up social volcanoes ready for eruption—only a vague, groping dissatisfaction with the existing social order in some colonies; but a more volatile people would have found plentiful opportunity in the actual circumstances of these two years for wild political extravagances and constitutional shipwreck. Precisely

* This was especially true in New York, Rhode Island, Vermont, Connecticut, New Jersey, North Carolina and Georgia, It would be an interesting and important task to trace in detail the extent of violence practiced in each colony by the various revolutionary bodies, and to consider carefully the complementary question of the degree of unanimity existing in favor of the Revolution at different stages. Such a task, however, would have been entirely beyond the compass of the present paper.

here did the strength of the American character show itself most forcibly in the Revolution. There was very little of the iconoclastic in the movement further than the necessary overthrow of the existing royal sanction and the substitution of the sanction of the people in governmental affairs.

The provisions of the revolutionary constitutions and bills of rights may now be compared under appropriate topical headings.

I. *The Bills of Rights.*—There will ever be a peculiar halo surrounding the bills of rights of the American Revolution. They were the platform of this great movement. In them the somewhat misty "rights of Englishmen," for the maintenance of which the Revolution was inaugurated, were set forth definitely and concisely, though with varying degrees of completeness. And these instruments have since become for Americans the fountain-head of chartered individual rights. With but slight modifications they now form a basis for the government of all the states and of the Union. But to fully appreciate their worth and import it should be remembered that they were not original either in idea or content. All, or nearly all, of the American colonies had at one time or another drawn up written instruments stating the rights of the individual as against the regularly constituted governmental authorities. But the foundation of precedent was still broader and deeper. Englishmen, as well as Americans, had a deep-seated habit of guarding individual liberty by binding written bills of rights. The bills of rights of the American Revolution are only a link in a long chain of institutional development, running back through the English Bill of Rights and Petition of Rights to Magna Charta, and all these formal expressions were only crystallizations of previous institutional development. At the same time it should be remembered that this common habit of Englishmen and Americans regarding written bills of rights is the point of departure in two quite different constitutional developments. The ultimate goal in both

cases has been popular sovereignty established upon a democratic basis, but the attainment of this goal has from the first been through quite different constitutional forms. The American colonies, at the very outset, established their constitutions upon definite written bases, and this fact in itself gave rise to a constitutional development very different from that of the English. Furthermore, in the one case monarchical and aristocratic forms were kept up, while in the other there was a continuous effort to incarnate the republican spirit in republican forms. The colonist clung tenaciously to the local institutions and the chartered individual liberty which he brought from England, but not so much to constitutional forms, and hence during a century and a half of development the English and American constitutions became quite divergent.

The germ of all the revolutionary bills of rights was the Declaration of Rights issued in 1765 by the Stamp Act Congress, which enunciated the cardinal doctrine of the Revolution, viz., that the colonists were entitled to the common law rights. This instrument was particularly intended to serve as a campaign invective against the Stamp Act, but it nevertheless laid the foundation for later enunciations of a more comprehensive character. After nine years of constant agitation the revolutionary leaders advanced to a clearer and more consistent position than they had formerly assumed, and issued another Declaration of Rights. This declaration of 1774 served as a fairly good model for all the later state bills of rights. These latter documents were little more than amplifications of this instrument of 1774, plus the doctrine of popular sovereignty.

Only seven of the revolutionary constitutions were accompanied by separate bills of rights;* but the other constitutions contained important provisions of this character, and these states also considered the declarations of 1765 and 1774, as

*Virginia, Pennsylvania, Maryland, North Carolina, Vermont, Massachusetts and New Hampshire. Connecticut, also, in continuing her charter, enacted a short bill of rights.

well as the Declaration of Independence, as bases of their new governments. Furthermore, all the states continued the operation of the common law within their borders. Although there is a general family resemblance between these various instruments they differ somewhat in content, and still more in form and phraseology. Of these instruments those of Massachusetts and New Hampshire, most nearly resemble each other while those of Virginia, Pennsylvania and Vermont are also much alike. The Maryland and North Carolina instruments are most unlike all the others, and quite different from each other.

One of the most characteristic features of these instruments was their reflection of the current eighteenth century philosophy. They had very much to say about "human equality" and "natural inalienable rights," "popular sovereignty" and "social compact."* Each of these instruments declared that no one should be deprived of his liberty except by law or by judgment of his peers; that every one, when prosecuted, should be entitled to a copy of the indictment brought against him, as well as to the right of procuring counsel and evidence; and that no one should be compelled to give evidence against himself. They all carefully guarded the right of trial by jury; guaranteed freedom of the press and free elections; forbade general warrants and standing armies in times of peace; forbade the granting of titles of nobility, hereditary honors and exclusive privileges. All of these instruments, except those of Virginia and Maryland, guaranteed the rights of assembly, petition, and instruction of representatives. All except those of Pennsylvania and Vermont forbade the requirement of excessive bail, the imposition of excessive fines, the infliction of unusual punishments, the suspension of laws by any other authority than the legislature, and taxation without representation. The

*New Hampshire Bill of Rights (secs. 1-3); Massachusetts Declaration of Rights (secs. 1, 5 and 7); Virginia Bill of Rights (secs. 1-3); Vermont Declaration of Rights (secs. 1, 3, 5, 6 and 17); Pennsylvania Declaration of Rights (secs. 1, 2, 4, 5 and 15); Maryland Declaration of Rights (secs. 1 and 19).

Maryland Declaration of Rights also declared poll-taxes "grievous and oppressive, and that all except paupers ought to contribute to the support of the government in proportion to their individual worth."*

The constitutions of Massachusetts, New Hampshire and Maryland forbade the quartering of troops in times of peace in any house without the consent of the owner. The same instruments guarded freedom of debate in the legislature, declared that laws should be impartially interpreted and that judges should enjoy good behavior tenures and honorable salaries. Those of New Hampshire, Pennsylvania and Vermont provided for the exemption of the "conscientiously scrupulous" from military service on condition that an equivalent should be paid. Those of New Hampshire, North Carolina, Massachusetts and Maryland forbade the passage of retrospective laws. Those of Massachusetts and Maryland forbade the legislature to attaint any particular person of treason or felony. The North Carolina Declaration of Rights forbade the granting of "perpetuities and monopolies." The Vermont Declaration of Rights forbade the transportation of offenders for trial of offences committed within the state, and also forbade slavery.

The doctrine of state sovereignty was asserted in the Massachusetts and New Hampshire instruments in the following blunt and positive language:

"The people of this state have the sole and exclusive right of governing themselves as a *free, sovereign* and *independent* state, and do, and *forever hereafter shall*, exercise and enjoy every power, jurisdiction and right pertaining thereto, which is not, or may not hereafter be by them expressly delegated to the United States of America in Congress assembled." †

The doctrine was much more mildly asserted in the Pennsylvania, Vermont, North Carolina, and Maryland instruments in the following or equivalent language: "The people of this state have the *sole, exclusive* and *inherent*

* Sec. 13.

† Massachusetts, Sec. 4; New Hampshire, Sec. 7.

right of governing and regulating the internal police of the same."*

The foregoing brief outline will give a general idea of the nature and content of the revolutionary bills of rights. It might seem that such codes of individual rights as those we have just outlined were unnecessary under constitutions vesting the ultimate authority in the people themselves and providing other means of popular control over the governmental agents. It might also seem very certain that gross violations of individual rights could not ordinarily occur under such constitutions as were established, and, on the other hand, that mere parchment checks such as those contained in these bills of rights could be very easily evaded by the popular agents under extraordinary circumstances. But in the mind of the author these very bills of rights have been of indubitable constitutional value. They have served continually as high ideals for political enlightenment, and have greatly helped to render many rights peculiarly sacred and proportionally difficult to violate; and as the popular conceptions of individual rights have gradually widened and deepened, such instruments have served as admirable tablets upon which these new conceptions have one by one been publicly and indelibly engraved. Neither is it boasting to say that these instruments of the American Revolution held up plainly before the view of the whole world higher ideals of individual rights than had ever before been incarnated in law, and it is at least partly the result of American example that all modern constitutional countries have come to agree approximately as to the content of individual liberty. But it must not here be forgotten that the bills of rights of the American Revolution not only made a clearer and more comprehensive definition of individual rights than had ever before been made in practice, but the constitutions to which they were appended also did much to absolutely guarantee these rights against governmental

* Pennsylvania, Sec. 3. Equivalent language in Vermont, Sec. 4; North Carolina, Sec. 2; Maryland, Sec. 2.

violation. These rights were declared to be beyond legislative and executive interference, and judiciaries, which were fairly independent in practice, were created for their just interpretation. With the speedy development of the unique powers of the American judiciaries (state and national) these rights came under their special guardianship and at the present moment no other country so adequately guards these rights against governmental violation.* As a result of this strong constitutional guardianship the American bills of rights have always served as a great check upon partisan excess, and have almost invariably served as admirable bases of resistance to legislative and executive oppression. †

II. *The Principle of the Separation of Powers.* — The most emphatic and unqualified assertion of this principle was contained in the Massachusetts Declaration of Rights. This instrument declared that:

"The legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them." ‡

It would be difficult to formulate a more iron-clad statement of the principle than the above. The same principle was quite emphatically asserted in the instruments of Maryland, North Carolina, Virginia and Georgia. The New Hampshire Bill of Rights stated the principle much less objectionably, as follows:

"The three essential powers, to wit, the legislative, executive and judicial, ought to be kept as separate from and independent of each

* For example, in France individual rights are absolutely dependent upon legislative caprice. In Germany a few rights and immunities are stated in the constitution (*Reichverfassung*, Art. 3), but there is no really independent judiciary to defend them. Even in England there is nothing to hinder Parliament wiping from the statute book the clauses guarding these rights.

† The author would express it as his judgment, however, that the tendency to enumerate specific individual rights, both in the bills of rights and in the constitutions can be, and has been of recent years, carried to great excess. An ideal bill of rights will contain simply a few plain and unexceptionable principles, otherwise legislation is liable to be unduly hampered.

‡ Sec. 30.

other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity." *

The constitutions of New York, New Jersey, Delaware, South Carolina (1776 and 1778), New Hampshire (1776), Pennsylvania and Vermont contained no specific statement of the principle, farther than an occasional prohibition upon individuals holding more than one office. The extent to which this principle was fulfilled or violated in the various constitutions will be apparent in the discussion of subsequent topics.

III. *Organization of the Legislative Department.*—In all the states, except Pennsylvania, Vermont and Georgia, bicameral legislatures were established, each house having an equal right of originating, amending and rejecting all bills except money bills. In all the states having two houses, except New York and North Carolina, the upper house was denied the right of originating money bills. In Maryland, Virginia, South Carolina (1776 and 1778) and New Jersey, this body was also denied the right of amending money bills. These restrictions would seem to indicate a lack of discrimination. It should be noted that even in the three states having a unicameral system, the executive council exercised some of the functions usually exercised by an upper house. For example, the president and council were required to prepare bills for the consideration of the assembly. In Georgia all bills were sent to the council for advice before becoming laws. In Pennsylvania and Vermont the prime purpose of an upper house was more or less obviated by the *referendum*.

Although not clearly stated in the constitutions in every case, the lower house was intended to represent the total voting population, while the upper house was generally intended to represent the rights of property. This was evidenced by the higher qualifications for electors and members of the latter body, and in two states, Massachusetts and New

* Sec. 37.

Hampshire (1784), by the creation of senatorial districts on the distinct basis of taxable property. In all cases existing territorial divisions (counties in the Middle and Southern States, and towns in New England) were made the units of representation in the lower house. In four states* the same territorial divisions were also made the units of representation, in the upper house, but with a smaller number chosen from each; in four states† artificial senatorial districts were created; in Maryland there were to be nine senators from the western and six from the eastern shore. In five states‡ territorial divisions were the only basis of representation in the lower house clearly stated in the constitution, each division electing an equal number of members. The same was true of the upper house in Virginia. All but three of the constitutions provided for the direct election of members of both houses by the qualified voters of their respective districts. Under the New Hampshire and South Carolina constitutions of 1776 the upper house was elected by and from the lower house. In Maryland, senators were elected indirectly by an electoral college. In all cases the upper house was an extremely small body, varying in size from nine members in the case of Delaware to thirty-one in the case of Massachusetts.§ The lower houses were in every case much larger bodies. The New York constitution required a septennial reapportionment; the South Carolina constitution 1778 of a reapportionment every fourteen years; the New Jersey legislature was empowered to reapportion whenever it seemed "equitable and proper."‖ The constitutions of Massachusetts and New Hampshire (1784) fixed a definite *ratio* of representation.

In every case but two¶ the term for members of the lower

* New Jersey, Delaware, North Carolina, South Carolina (1776 and 1778).

† Virginia, New York, Massachusetts, New Hampshire (1784).

‡ Virginia, North Carolina, Delaware, Maryland, New Jersey.

§ The maximum and minimum numbers of members allowed in New York were one hundred and twenty-four respectively.

‖ Art. 3.

¶ In South Carolina, two years; in Connecticut, under the charter, six months.

house was one year. In five states* the term for members of the upper house was the same as for the lower; in Delaware, three years; in New York and Virginia, four years; in Maryland, five years. There was nothing to hinder successive re-elections to either house in any of the bicameral states. In only one state, Maryland, was an age qualification for members of the lower house definitely specified in the constitution; but the same qualification (twenty-one years) was in every case to be inferred from the electoral qualifications. An age qualification of twenty-five years was required of members of the upper house in Virginia, Delaware and Maryland; thirty years in New Hampshire (1784), and South Carolina (1778); and inferentially twenty-one years in all other cases. All except New York and Delaware of the bicameral states, prescribed for members of both houses a residence qualification in the town, county or state, although the period was not always prescribed in the constitution. The average time of residence was one year, but in South Carolina (1778) it was five years. In all cases a property qualification was required of members of the upper house and also in all cases but that of New York† of members of the lower house. Some of these property qualifications were quite high, as for example in South Carolina where for senators it was a freehold worth two thousand pounds. The undemocratic spirit of these revolutionary constitutions was also plainly exhibited in the qualifications prescribed for electors. In addition to the almost universal sex (male), age (twenty-one years), and residence (various periods) qualifications, property qualifications were prescribed in every state except Vermont. These property qualifications varied in amount from the somewhat indefinite requirement that the elector be a taxpayer, to a freehold worth one hundred pounds. In New Hampshire (1784) the payment

* Massachusetts, New Hampshire, New Jersey, North Carolina and South Carolina.

† The New York constitution did not *prescribe* any property qualification, but it could, I think, be inferred from the electoral qualifications.

of a poll-tax, and in Georgia belonging to a "mechanic trade" would give the right of suffrage in lieu of holding property. In Massachusetts and Maryland members of both houses were required to be Christians; in North Carolina, South Carolina (1778) and New Hampshire (1784) they were also required to be Protestants. Section 19 of the New Jersey constitution was evidently intended to bar all except Protestants.* The South Carolina constitution (1778) also restricted the suffrage to believers in God and a future state of rewards and punishments.

In the unicameral legislatures existing territorial divisions were in each case made the units of representation. The Vermont constitution provided a fixed ratio of representation on the basis of the number of taxable inhabitants, but guaranteed each inhabited town one representative. The constitutions of Pennsylvania and Georgia fixed the representation of each county; that of Pennsylvania also provided for a septennial reapportionment on the basis of taxable inhabitants; that of Georgia fixed a ratio for increased representation of two counties. In each of these states members were elected directly by the qualified electors of each district. The term was one year in each case. In Pennsylvania a restriction provided that members could only serve four out of seven years. An age qualification of twenty-one years was prescribed for members in Georgia, and this qualification was inferentially the same in Pennsylvania and Vermont. Each of these states prescribed a residence qualification. In Georgia a property qualification was prescribed and members were also required to be Protestants.† The constitutions of Pennsylvania and Vermont did not distinctly

*The words "all inhabitants" in Art. 4 of the New Jersey Constitution would seem to have warranted female suffrage. At a celebrated election in Essex county in 1806, both females and colored persons were allowed to vote. But the legislature of 1807 set aside the election and enacted a new election law, declaring the phrase "all inhabitants" to mean "free white male citizens." This law, however, was sometimes set aside by election officers as unconstitutional, and in 1838 gave rise to the so-called "Broad Seal War."

† Religious qualifications will be more fully considered under another head.

prescribe any property qualification for members, but perhaps in Pennsylvania as in New York such a qualification may be inferred from the electoral qualifications. In Vermont, however, no property qualification whatever was prescribed by the constitution for members or electors.

The constitutions of Massachusetts and New York made the fullest and most specific provision for impeachment. In Massachusetts officers were to be impeached by a simple majority of the lower house and tried by the upper house, a two-thirds majority being necessary for conviction. The constitution also restricted the penalty to removal from office and disqualification, but left the offender subject to further trial in the regular courts. The process in New York differed from that in Massachusetts only in the requirement of a two-thirds majority in the lower house for impeachment.

The constitution of Delaware provided for the impeachment of officers by the lower house and their trial by the upper house, but fixed no majority necessary for impeachment or conviction. The punishment was confined to removal and disqualification with the possibility of further trial in the regular courts. All officers were to be impeached within eighteen months of the time the offence was committed. The constitution furthermore made the very singular and illogical provision that the president could only be impeached when out of office, thus inverting the very meaning and purpose of impeachment.

The constitution of Virginia provided for the impeachment of offending officers by the House of Delegates, and for their trial by the general court, or by the court of appeals, if any member of the former court were an interested party. No majority necessary for impeachment or conviction was stated; neither was any statement made concerning the punishment to be inflicted in case of conviction.

The constitution of North Carolina (Art. 23) loosely provided that offending officers could be prosecuted (supposably in the regular courts) on impeachment of the General

Assembly or on presentment of the grand jury of any court of supreme jurisdiction.

The New Jersey constitution provided for the impeachment of "all high officers except the governor,"* by the lower house, and for their trial by the upper house. No further provisions concerning impeachment were stated in that instrument. The New Hampshire constitution of 1784, declared that offending officers could be impeached by the lower house and tried by the upper house, but confined punishment to removal and disqualification, with the possibility of further trial in the regular courts. The constitution of Georgia (Sec. 49) merely stated regarding impeachment that "every officer of the state shall be liable to be called to account by the house of assembly." In Pennsylvania and Vermont offending officers were to be impeached by the legislature and tried by the chief executive in council. The constitutions of both these states furthermore made the somewhat shrewd provision that any officer could be impeached "after his resignation or removal" as well as when in office;† but they did not specify the number of votes necessary for impeachment or conviction, nor did they limit the penalty. The constitutions of Maryland and South Carolina (1776) made no provisions whatever for impeachment. This omission, however, was corrected by the South Carolina constitution of 1778. In this instrument provision was made for impeachment by the lower house and for trial by the senators and judges who were not members of the lower house. A vote of two-thirds of the members present in the respective bodies was required both for impeachment and conviction.

IV. *Organization of the Executive Department.*—(*A. Chief Executive.*)—All the constitutions under consideration, except that of New Hampshire (1776), provided for a nominal

*It is a matter of small wonder, perhaps, that this official was unimpeachable when one considers the very harmless scope of his powers.

†Pennsylvania Constitution, Sec. 22, Vermont Constitution, Sec. 20. It is interesting to note this provision in connection with later impeachment troubles under the Federal Constitution.

chief executive. In reality, however, the constitutions of Pennsylvania and Vermont did not establish a single executive, but an executive board. Indeed in some of the other states the powers of the nominal chief executive, independent of the executive council, were so extremely limited as to virtually vest executive power in the two jointly as an executive board.* We might perhaps also regard the council under the New Hampshire constitution of 1776 with its president quite as much as an executive board as an upper house. In all the states but four the chief executive was called governor; in Pennsylvania, New Hampshire (1784), South Carolina (1776) and Delaware he was called president. In seven states† this official was elected by joint ballot of the two houses of the legislature; in Pennsylvania by joint ballot of the assembly and executive council; in only four by the direct vote of the qualified electors of the state.‡ Only two states chose their chief executive for anything like a respectable term. These were New York and Delaware which prescribed a term of three years. In South Carolina the chief executive like members of the legislature enjoyed a two-years term. In all the other states this official was obliged to content himself with a one-year term. Furthermore the following restrictions were imposed on re-election: In North Carolina this official was made ineligible three out of every six years; in South Carolina (1776), four out of six;§ in Maryland and Virginia, four out of seven. This fanaticism was carried to the highest degree of absurdity in Georgia, where the governor could only serve one out of every three years.

The constitutions of Delaware and Virginia prescribed no qualifications whatever for the chief executive, save as these were to be inferred from the electoral qualifications. In New Jersey he was loosely required to be "some fit person;" in

* This was notably the case in Delaware.

† New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina (1776 and 1778), Georgia.

‡ Massachusetts, New York, Vermont, New Hampshire (1784).

§ This restriction was removed in 1778.

New York, a "wise and discreet freeholder;" in Maryland, a "person of wisdom, experience and virtue." In Pennsylvania, Vermont, Georgia and South Carolina (1776) he was to be qualified the same as members of the legislature. An age qualification of thirty years was definitely required in New Hampshire (1784) and North Carolina, and in Maryland of twenty-five years. Seven years' residence in the state was required in New Hampshire (1784); ten years, in South Carolina (1778), and five years, in North Carolina, Maryland and Massachusetts. Property qualifications were definitely prescribed in five states,* varying in amount from an estate worth 500 pounds, one-half freehold in New Hampshire, to a "settled plantation or freehold" worth 10,000 pounds in South Carolina (1778). The same religious qualifications were required in every case as for members of the legislature. In South Carolina the governor was required to have been a member of the privy council for five years before election. In only one state was the governor's salary fixed by the constitution. This was in the South Carolina constitution (1776) which guaranteed the president an annual salary of 9000 pounds. Four other constitutions contained loose provisions for the governor's salary, but in no case did these have any really mandatory effect.

In Pennsylvania and South Carolina (1776) there was a vice-president elected in the same manner as the president; in New Jersey there was a like-named official elected by the upper house; in New York, Massachusetts, South Carolina (1778) and Vermont there was a corresponding official, called lieutenant-governor, elected in the same manner as governor. In Delaware and North Carolina the presiding officer of the upper house succeeded in default of the chief executive; in Virginia and Georgia the president of the executive council, and in Maryland the first named of that body, succeeded the governor.

* New Hampshire (1784), North Carolina, Massachusetts, Maryland, South Carolina (1778).

(*B. Executive Council.*)—In all the states under consideration the chief executive was checked by an executive council. This body varied in size from three to twelve members, elected from one or both houses, or from the people at large. In Pennsylvania, Vermont, and Georgia* this council was elected directly by the qualified electors of the state, either at large or by districts; in the other states by both houses jointly or separately. In Pennsylvania the term was three years; in South Carolina, two years; in all the rest, one year. In New York there was a dual council. The council of revision consisted of the governor, chancellor, and any two or more of the judges of the supreme court. This body had the power of revising all bills, and a two-thirds majority of each house was required to overcome the veto of the council. Bills not returned by the council within ten days, became laws, unless the legislature adjourned in the meantime. In order to avoid a "pocket-veto," the council was required to return bills the first day of the following session in case of an adjournment within the ten-day period. The council of appointment consisted of one senator from each district appointed by the assembly, and presided over by the acting governor, who had a casting vote but no other vote. This body had the appointment of almost all the important officers in the state.

V. *Comparison of Legislative and Executive Powers.*—Under most of the revolutionary constitutions the legislature was truly omnipotent and the executive correspondingly weak. Nearly all of these instruments conferred upon the former body practically unlimited power. In six constitutions there was nothing whatever to prevent the legislature amending the constitution by ordinary legislative process; † the Maryland constitution permitted the legislature to amend by a simple majority of two successive sessions; ‡ and that of

* In Georgia the two members from each county attended by monthly rotation.

† New York, New Jersey, Virginia, South Carolina (1776), North Carolina, New Hampshire (1776).

‡ Any amendment, however, specifically affecting the Eastern Shore, required a two-third majority.

Delaware merely required a somewhat larger majority for amendments than for ordinary legislation.* Full legislative powers were in every case, expressly or by reasonable implication, conferred upon the legislature and generally without any great restrictions. As we have seen individual liberty was guarded by more or less complete and mandatory bills of rights or kindred provisions in the constitutions, but no other serious limitations upon legislation were imposed. In Massachusetts hasty and unwise legislation was checked by the qualified negative of a governor deriving his power from popular suffrage; in New York by the qualified negative of a rather hybrid Council of Revision; in South Carolina nominally by the absolute veto of the president, but here the same bill could be brought in again after a three days' adjournment and the veto power was also largely neutralized by the fact that the president was elected by the legislature;† in Vermont and Pennsylvania by a process approaching the referendum, whereby bills had to be published before third reading and then could not be passed until the next session.‡ With these few exceptions the legislatures were absolutely unrestrained in legislation by any outside checks, except re-elections. But this was not all. In addition to full legislative power these bodies were in many cases expressly endowed with important administrative powers, at the expense of the executive department. In five states § the legislature appointed nearly all the officers of the state; in others they appointed a number of the more important officers,

*On the other hand Massachusetts and New Hampshire (1784) provided for special constitutional conventions and ratification by popular vote. Georgia provided for a constitutional convention when petitions were received from a majority of the counties, signed by a majority of all the voters of the state. In Pennsylvania and Vermont the Council of Censors were to propose amendments which were to be considered by special convention, elected not less than six months after amendments were proposed by the Censors.

† This provision gave rise in practice to much corruption.

‡ The wording of the constitutions (Pennsylvania, Sec. 15; Vermont, Sec. 14), gave opportunity for evasion, however, and this seems to have so resulted in practice.

§ Virginia, North Carolina, South Carolina, New Jersey, New York (through the Council of Appointment).

and in others they shared this power with the governor and council. In no state could the governor exercise this power without the approval of his council. In Georgia, however, nearly all of the important officers were elected directly by the people. The importance of the legislature was furthermore expressly enhanced in most states by limitations upon the pardoning power. In only four states * could the chief executive exercise this power alone; in three † of these states he could not pardon in cases of impeachment and when otherwise directed by law, and more specifically in New York he was forbidden the exercise of this power in cases of impeachment, treason and murder. In Massachusetts and New Hampshire (1784) the chief executive with his council could pardon in all cases except impeachment; in New Jersey the governor with his council (as a court of appeals) could exercise unrestricted pardoning power; in Pennsylvania and Vermont the chief executive and council could pardon except in cases of impeachment, treason and murder, and in Virginia except in cases of impeachment and "where the law should otherwise direct." In Georgia‡ all pardoning power was reserved to the legislature and in South Carolina the constitution said nothing about the subject. It thus appears that only in New Jersey was legislative and judicial action checked by an unlimited pardoning power exercised by an outside body.§ In no case could a chief executive dissolve the legislature; and only in New York could he prorogue without its consent, and then only for a period of sixty days during any one year. Thus by express provision the natural powers of the legislatures were augmented at the expense of the executives, but it is quite as much to the point to note that the former were in a position to gradually trench more and more upon the administrative functions of the latter.

* New York, North Carolina, Maryland, Delaware.

† North Carolina, Maryland, Delaware.

‡ The governor and council could merely reprieve until the next session of the legislature.

§ Even in that case the pardoning body was practically the tool of the legislature.

Owing to the dependence of the executives upon the legislatures both in respect to salaries and appointment (in many cases) the latter could quite easily absorb all administrative powers not expressly conferred upon the former, and could even seriously cripple the executive power in the exercise of those powers which were expressly conferred. If we turn to a consideration of the relations of the legislatures to the judiciaries under the revolutionary constitutions, we find much the same opportunity for excessive encroachment on the part of the legislatures and a corresponding lack of absolute security and independence on the part of the judiciaries.

VI. *The Judicial Department.*—In the first place it is well to note that most of the revolutionary constitutions had very little to say about the judicial department. The existing colonial courts, which for the most part constituted excellent judicial systems, were generally continued with few or no changes in form; and whatever reorganization occured was effected by the respective constitutions only in very broad outline. As in the federal constitution, though generally not quite to the same degree, the details of judicial organization were left for statutory arrangement.

In every state but South Carolina* all judicial officers were dependent upon the legislature for their salaries. In four states,† all important judicial officers were dependent upon the legislature for appointment; in one ‡ upon the legislature and president, which practically amounted to the same thing because the president was little more than the tool of the legislature; in four states,§ upon the chief executive and council, and in all of these states but Massachusetts the council was dependent upon the legislature for its appointment; in New Hampshire (1784) upon the council and

* The South Carolina constitution fixed the salaries of the most important judicial officers.

† New Jersey, South Carolina, Virginia, North Carolina.

‡ Delaware. Each house also appointed three members of the court of appeals.

§ Pennsylvania, Vermont, Maryland, Massachusetts.

assembly; in New York largely upon the legislature through the Council of Appointment; in Georgia, directly upon the suffrage of the qualified electors (except the chief justice who was appointed by the legislature). The independence and efficiency of the judiciary were also imperiled in four states* by the limited term of office prescribed in the constitution,—in one of these states, Georgia, by the extremely short term of one year. In many states the legislature could also remove judicial officers. Furthermore in many states the legislature directly exercised extensive judicial functions, being in some cases a court of last resort. † But the possibilities of legislative encroachment did not end here. In many states the continued appointment of judicial officers (all or part) was not clearly mandatory, and in some of the states even the extinction of existing courts was possible under these constitutions. In most of the constitutions there was nothing absolutely to prevent adverse changes in the composition of the various courts, the subtraction of functions from these bodies and the conferring of the same upon the legislature or its creatures. It is well to remark, however, that in practice the system of courts established by these constitutions worked fairly well, but this was due rather to the personal virtues of the legislators than to the safeguards in the instruments themselves. It seems to me that all failed either in simply and unequivocally vesting all judicial functions in existing courts and such new courts as should from time to time be necessary; in providing proper regulations for the creation of such new courts; in placing salaries of judicial officers beyond legislative interference; in providing a good behavior tenure and properly guarding the same from unjust removals; in expressly forbidding legislative appropriation of distinctly judicial functions; or in

* Georgia, New Jersey, Pennsylvania, Vermont.

† *e. g.* The New Jersey Court of Appeals, and the New York Court of Impeachment and Errors. The South Carolina Court of Chancery was composed of the President and a majority of the Privy Council, all of whom were creatures of the legislature.

making the continued appointment of existing judicial officers clearly mandatory.

From the foregoing summary of the relations of the three departments it appears that, in spite of the very emphatic assertions of the principle of separation of powers in some of the constitutions under consideration, they all violated the principle in all or nearly all of the following ways: Direct legislative exercise of judicial functions; executive exercise of judicial functions; qualified negative of the executive; election of the chief executive by the legislature; election of the executive council by and from the legislature; appointment of executive and judicial officers by the legislature; presidency and vote of the chief executive or vice-executive in the upper house.

VII. *Relations between Church and State.*—In studying the relations existing between church and state under the revolutionary constitutions, one is impressed, I think, with the striking contrast between facts and pretensions. In almost every constitution were resonant and high-sounding clauses concerning the sacredness of religious liberty, in some concerning the wisdom and necessity of a complete separation of church and state, and yet in the self-same instruments one is almost equally sure of finding both of these principles wrenched and distorted to the utmost. This is not to be wondered at when one considers that only three of the colonies, Rhode Island, Pennsylvania and Delaware, had acknowledged the equality even of all Protestant sects, and only the last two of these colonies had extended this equality to Catholics. In most of the colonies public Catholic worship was illegal, and in some cases punished quite severely, and in New York and Massachusetts Catholic priests were liable to imprisonment and death.* It was only natural that the first state constitutions should

*As a rule, however, the laws against public Catholic worship in the colonies had become practically dead-letters by the middle of the eighteenth century; but their political disqualifications were enforced.

reflect this illiberal spirit, and come very far short of perfectly guaranteeing religious freedom for all sects, and yet, I say, these instruments loudly proclaim the principle of religious freedom.

The South Carolina constitution of 1778, distinctly declared the Christian Protestant religion to be the "established religion of this state," and proceeded to prescribe quite elaborate articles of faith for the same. At the same time this constitution provided that "all denominations of Christian Protestants demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges," and also declared that "no person shall by law be obliged to pay toward the maintenance and support of a religious worship that he does not freely join in, or has not voluntarily engaged to support."* The Massachusetts Declaration of Rights declared public religious worship to be a duty, and commanded the legislature to require the towns to support at public expense "Protestant teachers of piety, religion and morality in all cases where such provision shall not be made voluntarily."†

The legislature was also empowered to "enjoin" attendance upon public worship.‡ Who can tell to what lengths of inquisitorial zeal a Puritan legislature might go under the hovering protection of such a clause? The New Hampshire Bill of Rights empowered the legislature to require the towns to support Protestant clergymen at public expense. The Maryland Declaration of Rights empowered the legislature to

"Lay a general and equal tax for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor in general of any particular county." §

* Art. 38.
† Art. 3.
‡ *Ibid.*
§ Art. 33. It is well to note, however, that the legislature never imposed such a tax.

The Georgia constitution provided that no persons, "unless by consent [shall], support any teacher or teachers except those of their own profession." * I think this clause would have empowered the legislature to require persons to support teachers of their own persuasion (though such a law could easily have been evaded).

In six of the states† none but Protestants, and in two others, ‡ none but Christians could be elected to the legislature or hold high office. In four states, Delaware, Pennsylvania, Vermont and North Carolina, members of the legislature and important officers were required to acknowledge the inspiration of the Old and New Testaments; in the last three of these, the doctrine of divine rewards and punishment; and in the first the doctrine of the Trinity. Five of the revolutionary constitutions § barred clergymen from election to the legislature or high office. The South Carolina constitution of 1778, in addition to other electoral qualifications, required electors to believe in God and a future state of rewards and punishments.

The New York constitution was the only one of these instruments that was absolutely free from the above objectionable inconsistencies. In this constitution religious liberty was quite perfectly guarded,|| and this fact is the more interesting to note because the discriminations here made in colonial statutes had been peculiarly harsh.

VIII. *Education.*—Only a few of the states inserted in their first constitutions provisions regarding education and except in the case of two states these provisions were not very satisfactory. The Georgia constitution simply provided that

"Schools shall be erected in each county, and supported at the

* Art. 56.

† New Hampshire (1784), Georgia, South Carolina, Pennsylvania, Vermont, North Carolina. The New Jersey constitution (Art. 19), also, by specifically providing that all Protestants could hold office, impliedly prohibited all others.

‡ Massachusetts, Maryland.

§ Georgia, Delaware, Maryland, New York, South Carolina.

|| Art. 38.

general expense of the state, as the legislature shall hereafter point out."*

The Pennsylvania constitution a little more specifically provided that

"A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices; and all useful learning shall be duly encouraged and promoted in one or more universities."†

The North Carolina constitution contained exactly the same provision.‡ The Vermont constitution still more definitely provided that

"A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town; making proper use of school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this state, ought to be established by direction of the General Assembly."§

The Massachusetts and New Hampshire (1784) constitutions contained by far the most comprehensive provisions concerning education and learning. The latter instrument declared it to be

"The duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards and immunities for the promotion of agriculture, arts, science, commerce, trades, manufactures and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments among the people."‖

The former instrument contained almost identical language,¶ and in addition made detailed provisions concerning

* Art. 54.
† Art. 44.
‡ Art. 41.
§ Sec. 40.
‖ Poore's "Charters and Constitutions," Vol. ii, p. 1291.
¶ Massachusetts constitution, Cap. v, Sec. 2.

Harvard University.* These provisions would seem to furnish a constitutional foundation for the veriest paternalism conceivable, and it would have almost taxed the ingenuity of superhuman wisdom to have executed them.

IX. *Delegates to Congress.*—The Articles of Confederation, it will be remembered, required that delegates to the Continental Congress be annually elected in such manner as each state legislature should provide, subject to recall and with eligibility limited to three years out of six. These provisions simply struck an average between the provisions of the various state constitutions on the same subject. It may be well to briefly state the provisions on this point contained in these latter instruments.

The constitutions of New Jersey and New Hampshire (1776) did not provide in any manner for the election of delegates to congress. This perhaps is not to be wondered at when we remember that both of these constitutions were considered as merely temporary instruments and that when they were adopted it was scarcely expected that there would long be any occasion for a continental congress. The constitutions of Delaware, Maryland, Massachusetts, North Carolina, South Carolina (1776 and 1778) and Virginia provided that delegates should be annually elected by joint ballot of both houses. The constitution of New Hampshire of 1784 provided that delegates should be elected annually by each house separately. In Pennsylvania and Vermont delegates were to be annually elected by the Assembly. In New York each house was to nominate annually a full list and names occurring in both lists were to be declared elected. The Georgia constitution declared that delegates "shall be appointed annually," but does not state by whom they were to be appointed.† In practice, however, they were elected directly by the qualified electors.

In Maryland delegates were made ineligible three out of

* *Ibid.*, Sec. 1.
† Art. xvi.

every six years; in New Hampshire (1784), two out of every five years;* in Pennsylvania and Vermont, three out of every five years. In North Carolina delegates could not serve more than three years successively, but the constitution did not fix any definite period of ineligibility.† The Massachusetts constitution stated that delegates were "to serve one year," but made no statement regarding ineligibility. The Massachusetts constitution bluntly asserted that delegates could be "recalled," while the North Carolina, Vermont and Pennsylvania constitutions merely stated that delegates could be "superseded."‡

The Georgia constitution was peculiar in that it declared that delegates could sit, debate and vote in the House of Assembly. The Maryland constitution applied the principle of rotation in the election of delegates, so that two, at least, should be changed annually. This constitution also fixed the qualifications of delegates, said delegates being required to be twenty-one years of age, resident in the state for five years, and owners of real and personal property worth one thousand pounds current money. In New Hampshire a delegate was to have the same qualifications as the president of the state.

X. *Slavery.*—Only a few of the revolutionary constitutions made any direct reference to the subject of slavery. A few impliedly recognized the institution, and some contained prohibitory clauses of more or less mandatory effect. The constitution of South Carolina of 1778 conferred civil and political rights only upon "free whites."§ The constitution of Georgia conferred political rights only upon "whites."‖ These constitutions evidently sanctioned slavery. It might

* This was plainly a violation of Article 5 of the Articles of Confederation, which forbade any one serving more than three out of six years.

† Article 5 of the Articles of Confederation fixed such a period. See above.

‡ I am unable to ascertain whether the differences implied in the terms *supersede* and *recall* were contemplated in these constitutions. Certainly practice took the form of recall in both these states as well as in others.

§ Art. 41.

‖ Art. 9.

perhaps be argued that the use of the word "freemen" in those clauses of the constitutions of Maryland, North Carolina and Pennsylvania, which defined civil and political rights, recognized slavery as an institution. In the cases of Maryland and North Carolina I see no reason why such reasoning would not be valid, but in the case of Pennsylvania there was a clause in the declaration of rights which furnished a very good basis for an opposite argument. Article 1 of that instrument read as follows:

"That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."

It is certainly true that this language did not directly forbid slavery in Pennsylvania, but at the same time it is quite as direct and mandatory as that of the New Hampshire bill of rights, which was generally thought in that state to abolish slavery, and as that of the Massachusetts declaration of rights, which was construed by the supreme court of that state in 1781 to abolish slavery. The language of Article 1 of the New Hampshire bill of rights was as follows:

"All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good."

Article 1 of the Massachusetts declaration of rights read as follows:

"All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness."

The only revolutionary constitutions which made any direct reference to slavery were those of Delaware and Vermont. The former instrument declared:

"No person hereafter imported into this state from Africa ought to be held in slavery under any pretence whatever; and no negro, Indian

or mulatto slave ought to be brought into this state, for sale, from any part of the world." *

This language is clear and emphatic, but not mandatory; manifestly legislation was necessary to make it so. The language of the Vermont declaration of rights on this subject was the most direct and comprehensive of all the instruments under our consideration. Article 1 of that instrument declared that:

"All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. *Therefore no male person, born in this country or brought from over the sea, ought to be holden by law to serve any person as a servant, slave or apprentice after he arrives to the age of twenty-one years, nor female in like manner after she arrives to the age of eighteen years, unless they are bound by their own consent after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.*"

The constitutions of Virginia, South Carolina (1776), New Hampshire (1776), New York and New Jersey made no reference whatever to the subject of slavery.

XI. *Miscellaneous.*—Under this heading I wish to call attention to a number of provisions peculiar to but one or a very few of the revolutionary constitutions which do not readily admit of other classification, most of which, however, are none the less interesting.

Several of these instruments provided for a periodical enumeration of the electors of the respective states, but only three provided specifically for a census in the modern sense. The Massachusetts constitution provided for "a valuation of estates within the commonwealth, taken anew once in every ten years, at least, and as much oftener as the General Court shall order,"† and the New Hampshire constitution of 1784 provided for a similar "valuation of estates" once in every

* Art. 26.

† Cap. 1, Sec. 1, Art. 3.

five years.* The New York constitution did not specifically provide for a "valuation of estates," but did provide for a "census of the electors and inhabitants" of that state to be taken once in every seven years.†

The constitutions of Pennsylvania (Sec. 37), North Carolina (Sec. 43) and Vermont (Sec. 34) declared that the "future legislature" of the respective states should regulate entails in such a manner as to prevent perpetuities, but manifestly this language was too indefinite to be mandatory. Article 51 of the Georgia constitution more definitely provided—that "estates shall not be entailed; and when a person dies intestate, his or her estate shall be divided equally among their children." This was the only provision of the kind in any revolutionary constitution, and was very important.‡

While most of the revolutionary constitutions referred to a state militia, only four specifically required the levying, organization and training of the same. These were the constitutions of Georgia (Sec. 35), Pennsylvania (Sec. 5), Vermont (Sec. 5) and New York (Sec. 40).

The constitution of South Carolina of 1778 (Sec. 40) commanded a reform of the penal laws of the state with reference to less "sanguinary punishments;" but the time for such reform was not stated. The constitution of Pennsylvania (Sec. 38) vaguely commanded such reform "as soon as may be."

The constitutions of New Hampshire of 1784 and New Jersey forbade deodands and the forfeiture of the estates of suicides.

The constitutions of Virginia, New York and North Carolina forbade private purchases of lands from the Indians.

The constitutions of North Carolina, Pennsylvania and Vermont forbade the imprisonment of any person for debt,

* Poore, *op. cit.*, Vol. ii., p. 1284.

† Art. 5.

‡ Between the years 1784–96 all the states followed the example of Georgia in decreeing equal distribution of intestate property.

after the *bona fide* delivery of all property for the use of creditors.

Four of the constitutions touched specifically upon the subject of naturalization.* The New York constitution (Art. 40) permitted naturalization laws but required the subject to renounce former allegiance and take an oath of allegiance to the state. The North Carolina constitution (Art. 40) declared that foreigners, after taking an oath of allegiance, could "purchase, acquire, hold and transfer land or other real estate," and after one year's residence in the state should be deemed "a free citizen." The constitutions of Vermont (Sec. 38) and Pennsylvania (Sec. 42) contained the same provisions as did the constitution of North Carolina, save that the former two instruments made the additional but elastic requirement of "good character."

The constitutions of Massachusetts and New Hampshire (1784) declared that no person duly convicted of bribery could serve in the legislature or hold office.† The constitution of Pennsylvania (Sec. 32) went farther and, in addition to this prohibition, declared that "any elector, who shall receive any gift or reward for his vote, in meat, drink, moneys or otherwise," should forfeit his right to elect for that time. The Maryland constitution (Art. 54) declared that both the briber and the bribed "should be forever disqualified to hold any office of trust or profit in the state."

The constitutions of North Carolina and Virginia fixed the boundaries of the respective states.‡ The constitution of New York (Art. 36) abrogated all grants of lands within that state made by the king of Great Britain or his agents after October 14, 1775.

It is interesting to note the somewhat rare practice of

*The Act of Parliament of 1746, concerning naturalization, was still in force in some states. This law prescribed as conditions for naturalization an oath of allegiance, a seven years' residence and the profession of the Protestant faith.

† Massachusetts Constitution, Pt. 2, Cap. vi, Art. 2, and New Hampshire Constitution (1784) in Poore, *op. cit.*, Vol. ii.

‡ North Carolina Declaration of Rights, Art. 25, and Virginia Constitution, last section.

"rotation" provided for in a few of the revolutionary constitutions. The New York and Virginia constitutions provided for the retirement of one-fourth of the senators annually; the Virginia constitution also provided for the retirement of two of the eight councillors every three years; the South Carolina constitution (1778) provided for the retirement of one-half of the privy councillors every year; the Maryland constitution provided that at least two delegates to congress should be changed yearly; the Delaware constitution provided for the retirement of one-third of the members of the upper house annually. Article 8 of the same instrument prescribed a rather peculiar process of rotation in the privy council, as follows:

"Two members shall be removed by ballot, one by the legislative council, and one by the house of assembly, at the end of two years, and those who remain the next year after, who shall severally be ineligible for the three next years. The vacancies, as well as those occasioned by death or incapacity, shall be supplied by new elections in the same manner; *and this rotation of a privy councillor shall be continued afterward in due order annually forever.*"

According to this scheme the term of one-half of the council must have always been two years and of the other half three years.

There were several provisions peculiar to the constitutions of Pennsylvania and Vermont which are worthy of notice. One of the chief peculiarities of these instruments was the creation of a Council of Censors. This body consisted of two persons from each city and county in Pennsylvania, and of thirteen persons in Vermont, elected by the qualified electors. They were to be elected for the first time in Pennsylvania in 1783 and in Vermont in 1785, and in both states every seven years thereafter. It was the duty of this body in each state to inquire whether the constitution had been violated, whether the public taxes had been justly levied and collected, and whether the laws had been duly executed. They were given the power to send for persons, papers and records; to pass public censures; to order impeachments; and

to recommend the repeal of unconstitutional laws. These powers were conferred for one year. The censors by a two-thirds vote of the whole body elected, could call a convention for revising the constitution, but were required to publish proposed amendments six months before the election of said convention.

These same two constitutions contained the following principle of taxation:

"Before any law be made for raising it, the purpose for which any tax is to be raised ought to appear clearly to the legislature to be of more service to the community than the money would be if not collected." *

The following clause in these same instruments would occasion considerable mirth among a certain class of modern American politicians:

"As every freeman, to preserve his independence (if without a sufficient estate) ought to have some profession, calling, trade or farm, whereby he may honestly subsist, *there can be no necessity for, nor use in establishing offices of profit, the usual effects of which are dependence and servility unbecoming freemen in the possessors and expectants;* faction, contention, corruption, and disorder among the people. But if any man is called into public service, to the prejudice of his private affairs, he has a right to a reasonable compensation; and whenever an office, through increase of fees or otherwise, becomes so profitable as to occasion many to apply for it, the profits ought to be lessened by the legislature." †

The foregoing study has revealed several glaring defects in our earliest state constitutions, but on the whole perhaps these defects were no more numerous than one would expect when one remembers the circumstances under which these instruments were framed. For example, the most glaring defect of all, viz., the extreme power lodged in the hands of the legislatures, was no doubt directly due to the many aggravating experiences with the colonial governors both in the earlier periods and during the struggle amid which the

* Constitution of Pennsylvania, Sec. 41. Constitution of Vermont, Sec. 37.
† Constitution of Pennsylvania, Sec. 36. Constitution of Vermont, Sec. 33.

first constitutions were formulated. But faulty or otherwise, it is important to note that these first state constitutions were little more than the pre-existing colonial constitutions adapted to the changed circumstances. The statesmen composing the various state conventions were neither dominated by doctrinarianism nor by the spirit of servile imitation of foreign models. Their work was neither destructive nor creative, but preservative and selective. In almost every case the principal constitutional usages, which had been developed during the colonial period, were preserved. And yet there was large room for statesmanship in the final and detailed formulation of these usages, in their adaptation to the changed conditions, as well as in the exercise of good judgment in occasionally curtailing or enlarging the provisions of the colonial constitutions. In these revolutionary instruments the whole structure and the functions of each department of government were more clearly defined. The upper house, in particular, which had previously been based upon appointment had to be thoroughly remodeled. For this work no foreign model whatever existed, and hence we have found a great variety of provisions concerning this body in the various instruments considered. But the functions of the upper houses in general remained the same as those of the colonial council, save that the function of giving executive advice under the colonial system was conferred upon a separate body by the first state constitutions, *i. e.*, the colonial council was split into two parts, so to speak, the executive council and the upper house. Then, too, in all the states, except Rhode Island and Connecticut, the executive had to be thoroughly reorganized and republicanized by the first state constitutions. But in none of these changes was the identity of the colonial constitutions destroyed.

It would hardly seem adequate to conclude our study of the revolutionary constitutions without briefly noting their influence upon the formation and adoption of the federal constitution. Until quite recently two very erroneous

theories concerning the sources of this latter instrument have prevailed, and one or the other of these theories has seemingly tinctured the work of most historians of the constitution. According to one of these theories, the federal constitution is a creation out of hand of an absolutely new frame of government; and according to the other view, it is only a "faithful copy" of the "contemporary constitution of England." We must steer midway between the two theories for the true view.

We have just seen that the first state constitutions were little more than formulations of pre-existing colonial usages. Just so, the federal constitution was very largely the product of a wise selection of the best and most generally observed usages of the various states. The truth is, and this indeed seems most natural, that from the very beginning of American history even to the present, all of our institutions, local and federal, have been constantly growing, and were not at any stage the product of manufacture. All our federal and state constitutions have been the result of this continuous growth, in which there has been no serious break. It is artificial in the extreme to regard the Revolutionary War as an impassable gulf between colonial and national development. Either of the above theories fixes such a gulf. We must remember that there were few destructive elements in the American Revolution. Previous industrial, legal, social and political habits and practices necessarily continued, and the formulation of the first state constitutions at the very outset of our revolutionary struggle was one crystallized result of this fact. But institutional development in America was not to stop at this stage. The inevitable destiny of American constitutional development was a federal republic. Local institutions, fundamentally similar, necessarily expanded into a federal system of government. Signs of its coming had been revealed even during the colonial period. The federal constitution was not the beginning but the climax of American institutional development. Necessarily,

then, the federal constitution was adapted to the already existing state constitutions, the two systems were made to fit formally.

The absurdity of the antiquated theory that the federal constitution was the fiat-creation of the "fathers" is made evident the very instant one applies critical thought and good judgment to the subject. The fifty-five members of the federal convention were not demi-gods, and did not possess the superhuman wisdom necessary for creating an absolutely new constitution that would work admirably for over a century. Indeed the careful student of the period of the formation and adoption of the constitution knows full well that there was little room for mere theory in the federal convention. As Mr. Patterson of New Jersey remarked in that body, "We must follow the people; the people will not follow us." Even the most innocent theoretical suggestions and ventures were scouted and borne down in the intense spirit of practical statesmanship which prevailed. Practical interests and individual views were too many and too conflicting to admit of theoretical constitutional formations. No one of the "fathers" had sufficient mental and moral ascendancy to palm off his constitutional theories upon the others. No theory could possibly have run the gauntlet of "large" and "small" state interests; commercial and agricultural interests; debtor and creditor interests; slave-holding and non-slave-holding interests.

On the other hand, it is the most natural supposition imaginable that the pre-existing state constitutions would very greatly influence the formation and adoption of the federal constitution. From one-third to one-half of the members of the federal convention had been members of the conventions which framed the several state constitutions, and a very large number of the members of the various ratifying conventions had also had a part in the formation of the respective state constitutions. Add to these facts the eminently conservative character of the Americans of the

time, and it would seem strange indeed if the "fathers" should have departed very far from the constitutional forms already worked out on American soil and already embodied in the first state constitutions. If we should take a further step and find a strong actual resemblance, not only in outline but also in detail, between the federal constitution and all or a part of the already existing state constitutions, I think the suspicion would be warrantable that the latter had exerted a strong influence upon the former. Indeed, the burden of proof would almost seem to lie with those who cherish the opposite opinion. Now, as a matter of fact, such a resemblance does actually exist. It would be an easy task to show that most of the purely formal provisions of the federal constitution did actually exist already in one or more of the constitutions which have been outlined in the foregoing pages. Furthermore, conscious imitation of the state constitutions on the part of the framers of the federal constitution could be quite conclusively shown by a careful examination of available documentary evidence. The sources for such evidence to which one would most naturally turn are three in number, the debates of the federal convention, the debates of the various ratifying conventions, and the current pamphlet literature concerning the constitution. In seeking for such evidence however, one meets with some great difficulties. Much of the imitation alluded to was so very natural and spontaneous that it probably would not be noted in set speeches. Another great difficulty exists in the fact that the debates in all these conventions were not very fully reported. But in spite of these difficulties, enough evidence exists, I think, to show quite conclusively the conscious influence of the first state constitutions, both in detail and general outline, upon the federal constitution. *

As to the other erroneous theory, a careful examination of the above sources makes it equally certain that the

*Cf. paper by Professor J. H. Robinson on "The Original and Derived Features of the Constitution," in ANNALS, Vol. 1, pp. 203-43.

"contemporary English constitution" did not exert anything like the influence upon the formation of the American federal constitution, that the advocates of this theory have taken for granted. But no one can deny that English influence was felt to a certain extent in the development of the various colonial constitutions. Both nations are Anglo-Saxon, accordingly the child was necessarily influenced by the parent. The child inherited traits, and yet in the course of his individual development he became very different from the parent. The similarities are rather general analogies than similarities of detail, and these analogies exist more as a result of a certain influence produced far back in the embryonic period of American development, than at any later time. Certainly neither the federal constitution nor the state constitutions were faithfully copied from the English constitution.*

Perhaps enough has been said to emphasize the very great importance of the revolutionary constitutions and bills of rights (and back of them the colonial constitutions) as the real foundation of American constitutional law. If so, the author of this paper has accomplished his purpose. It was with a belief in the importance of such a study, both to the scholar and the layman, that the author ventured to put together in convenient topical form the leading features of these instruments. But he wishes to make it perfectly clear that he regards these instruments as only the foundation for a proper study of American constitutional law. Equipped with a rich inheritance from the colonial régime, the American has from the first moment of independence been constantly developing his constitution, both state and federal, liberalizing and adapting it to constantly changing conditions, and this by the double process of constitutional amendment and judicial interpretation. It is also of supreme importance,

*It does not seem to the author, however, that the *exact extent* of English influence upon the development of the various colonial constitutions has yet been adequately shown.

both for the scholar and the educated citizen, to trace these subsequent changes not only in the federal but also in the state constitutions. In the opinion of the author one phase of this subject has been thus far neglected by students, namely, a satisfactory and careful comparative study of the leading phases of state constitutional development. It would seem that the importance and practical utility of such studies would warrant and abundantly repay those endowed with ample time and ability for so large a task.

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